liable to his pledgor in trover without a tender of the debt, is a question on which the authorities are in conflict. The first adjudication of the point in England held him liable, but limited the plaintiff's recovery to the amount of his actual loss.[1] The case was, however, virtually overruled by two later decisions,[2] and the law is now settled in England that the pledgor's right to possession of the pledge is always conditioned on tender of the debt. A recent Canadian case has approved the English view. *Ames* v. *Sutherland*, 5 Ont. W. Rep. 328. In this country the courts are still in conflict.[3] The English rule is difficult to defend. It is well settled that a mere lien-holder, as a bailee for hire, is immediately liable in trover for wrongfully parting with the bailed property.[4] By parting with it he loses his lien, and the bailor thus acquires an immediate right of possession. The only reason assigned for a different holding in the case of a pledgee is that his rights are larger than those of a lien-holder: on compliance with certain conditions he has a right to sell or re-pledge; therefore, it is argued, an improper sale or re-pledge does not altogether divest him of his right of possession as against the pledgor. The question of the amplitude of his powers seems, however, quite beside the mark; whatever they may be, if he exceeds them, he should be held as strictly to account as a bailee for hire.

If, however, he is liable in trover, must he pay full damages? The English case which holds that he need not, apparently places his right to reduce the damages on principles of recoupment;[1] and some American cases have expressly put it on this ground.[5] This view, however, seems questionable. The common law right to reduce damages in recoupment exists only where the defendant has suffered loss by the plaintiff's breach of an obligation arising from the same contract,[6] and the right would thus seem hardly broad enough to include the case under discussion.[7] Moreover, even if recoupment is allowed, it will obviously not afford the pledgee an adequate remedy where the pledge at the time of the conversion is worth less than the debt,[8] — as, for instance, where stock has been bought on margin and the margin has been wiped out. In such a case the defendant, for complete protection, would have to rely on the statutory remedies of set-off or counterclaim, which, however, in many jurisdictions in this country would probably be found liberal enough for the purpose.[9] But even if neither recoupment nor a statutory remedy is available, the result could hardly be considered unjust, since it is by his own breach of contract that the pledgee has been deprived of his security.

FORFEITURE OF INSTALMENTS BY CONDITIONAL VENDEE UPON DEFAULT. — There is considerable conflict of opinion upon the question of the conditional vendee's right to instalments already paid, when he makes default

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[1] Johnson *v.* Stear, 15 C. B. (N. S.) 329.
[2] Donald *v.* Suckling, L. R. 1 Q. B. 585; Halliday *v.* Holgate, L. R. 3 Exch. 299.
[3] In *accord* with the English rule, Talty *v.* Freedman's Savings Bank, 93 U. S. 321. *Contra*, Neiler & Warren *v.* Kelley, 69 Pa. St. 403; Feige *v.* Bert, 118 Mich. 243.
[4] Pollock, Torts, 6th ed., 350.
[5] Neiler & Warren *v.* Kelley, *supra*.
[6] Waterman, Set-off, Recoupment and Counterclaim § 422.
[7] See Smith *v.* Hall, 67 N. Y. 48.
[8] See Batterman *v.* Paine, 3 Hill (N. Y.) 171.
[9] See Richardson *v.* Ashby, 132 Mo. 238.

and the seller retakes the chattel. Text-writers favor forfeiture;[1] but eliminating those cases where forfeiture on default was expressly provided for, and those in which the court allows the vendor to retake the chattel but expressly refuses to discuss the right of the vendee to recover his previous payments in another action, it appears that the authority in support of this view is slight. A *dictum*, forming an alternate ground for a decision by the supreme court of Illinois, directly denies the vendee's right to the instalments,[2] but a much later case, in a lower court of the same state, takes a different view.[3] Massachusetts and Vermont allow the full value of the chattel to be recovered from the vendee when he converts it, and refuse to let him plead the prior payments in mitigation of damages.[4] Maine grants the same stern remedy against the sub-vendee.[5] These, however, are cases of conversion, not of default, and may possibly be distinguished, though indicating the court's temper. On the other hand, the weight of authority seems to favor the view recently taken by the supreme court of Utah, which has just sustained a refusal to instruct that the paid instalments were forfeited. *Shafer* v. *Russell*, 79 Pac. Rep. 559. In Georgia,[6] there is a square holding, followed by *dicta* to the same effect,[7] that an action cannot be brought against the defaulting vendee for the chattel, without tender of the instalments previously paid. The Michigan supreme court has gone so far as to announce its opinion that even an express agreement to forfeit will not be enforced.[8] North Carolina and Mississippi hold that where the vendor retakes and sells the chattel he must apply the paid instalments on the debt and turn over the surplus from the resale to the original vendee.[9] New York now reaches the same result by statute, as to a large class of chattels.

In short, the tendency seems to be against forfeiture and toward the application of mortgage principles. The courts consistently refuse to construe such contracts as leases, though so worded.[10] They refuse to allow the buyer to exempt himself from liability for the purchase price by returning the chattel and tendering damages for his breach,[11] — a position difficult to explain save on the ground that the retention of title is in effect a mortgage. By the same analogy, though title has not passed, when the chattel is destroyed the loss is fixed on the vendee and he is made to pay his instalments after the *quid pro quo* has disappeared.[12] Here again the reserved title in the vendor is treated merely as security whose fluctuation in value cannot affect the obligation. If this transaction is not in effect a mortgage, the great mass of decisions based on this analogy is wrong; if it is in effect a mortgage, then the analogy should apply in favor of the buyer as well as the seller, and it is against the equitable spirit of modern law to apply the doctrine of strict foreclosure.

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1 Benjamin, Sales, 6th Am. ed., 284; 6 Am. & Eng. Enc. 458, n. 6.
2 Latham *v.* Sumner, 89 Ill. 233.
3 Singer, etc., Co. *v.* Ellington, 103 Ill. App. 517.
4 Angier *v.* Taunton, etc., Co., 1 Gray (Mass.) 621; Morgan *v.* Robinson, 55 Vt. 367.
5 Hawkins *v.* Hersey, 86 Me. 394.
6 Hays *v.* Jordan, 85 Ga. 741.
7 Snook *v.* Raglan, 89 Ga. 251.
8 Johnston *v.* Whittemore, 27 Mich. 463, 470.
9 Puffer *v.* Lucas, 112 N. C. 377; Dederick *v.* Wolfe, 68 Miss. 500.
10 Contracting, etc., Co. *v.* Continental Trust Co., 108 Fed. Rep. 1.
11 Smith *v.* Aldrich, 180 Mass. 367.
12 Tufts *v.* Wynne & Thompson, 45 Mo. App. 42.